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No. 04-186

Supreme Court, U.S.
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In The
Supreme Court of the United States

PAULINE KOZIARA and KATHLEEN DeRIENZO,

Petitioners,

vs.

SEMINOLE COUNTY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Fifth District

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Seminole County's Ordinance No. 98-49, which regulates public nudity, is constitutional.

PARTIES TO THE PROCEEDING

The parties listed in the caption, Pauline Koziara and Kathleen DeRienzo, and Seminole County, Florida, are the only parties to this proceeding.

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STATEMENT OF THE CASE

Petitioners Pauline Koziara and Kathleen DeRienzo (hereinafter "Petitioners") filed suit against Respondent, Seminole County, Florida, (hereinafter "County" or "Respondent") for a judgment declaring that the County's Ordinance 98-49 (hereinafter "Ordinance") (Pet. App. E) is invalid under the Florida and/or United States Constitutions, and for an injunction permanently forbidding the enforcement of the Ordinance. Petitioners also sought the issuance of a temporary injunction to prevent the enforcement of the Ordinance during the pendency of the litigation. Following a hearing, Petitioners' motion for temporary injunction was denied (Pet. App. C).

The County moved for final summary judgment, or alternatively, partial summary judgment. Petitioners responded by filing a cross motion for summary judgment. The court entered partial summary judgment, stating "The similarities between the Seminole County Ordinance [and] the ordinance in [*City of*] *Erie* [*v. Pap's A.M.*, 529 U.S. 277 (2000)] leads to the conclusion that the Seminole County Public Nudity Ordinance is content-neutral and entitled to only the 'outer ambit' of First Amendment protection." The court also ruled that the Ordinance passes the first prong of the legal test for determining the constitutionality of statutory regulation of expressive conduct set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), because the enactment of the ordinance is within the constitutional power of the County since the County's efforts in enacting the Ordinance are to protect the public health, safety, and welfare.

The County thereafter moved for summary judgment regarding the proper evidentiary standard required at

trial. The court ruled upon said motion by ordering that the following issues were set for trial:

> 1. What information, if any, did the County rely upon in making its legislative findings concerning the "secondary effects" recited in the ordinance?
>
> 2. If the County relied upon information in making its legislative findings, was the reliance reasonable?
>
> 3. Does the ordinance provide for "an adequate alternative means of communication?"

Following a lengthy trial, the trial court entered final judgment in favor of the County (Pet. App. B). Petitioners appealed to the Fifth District Court of Appeal of the State of Florida. The Florida Fifth District Court affirmed. *Koziara v. Seminole County,* 873 So.2d 374 (Fla. 5th DCA 2004) (Pet. App. A). Petitioners moved for rehearing, but their motion was denied (Pet. App. D). Petitioners did not seek discretionary review in the Florida Supreme Court and opted, instead, to seek review in this Court.

STATEMENT OF THE FACTS

A. The Enactment of the Ordinance was Proper

Petitioners incorrectly state that the County Commission "repeatedly rejected" the Ordinance. Like this assertion, Petitioners create many assertions which are clearly misrepresentations of the record. Petitioners' protestations are without moment because the manner in which the Ordinance was enacted complies with all legal standards set by this Court.

It is not true that Seminole County's Sheriff was against the Ordinance. Seminole County's Sheriff actually stated at the August 11, 1998, County Commission meeting that Seminole County was a "magnet" for crime because people were drawn to Seminole County for the full nudity which was not allowed in any other surrounding jurisdiction (R-3-493). It is not true that Seminole County's Commissioners were against the Ordinance. All the County Commissioners repeatedly stated that they believe adult businesses created harm to the community. Commissioner Morris clearly stated "this whole thing [Ordinance] came from the County Commission" (R-3-450). Notably, Petitioners failed to even call the sheriff or any commissioners at trial.

Petitioners cannot dispute that Seminole County's Commissioners received into the commission record volumes of materials supporting nudity regulations mirroring the Ordinance which included examples of secondary effects, other enacted ordinances, and the cases interpreting those ordinances (R-3-437-494; R-4-600-621; R-5-626-759; R-6-918-930; R-7-961-1062; R-1-1393-1492). No other issue in recent history before the Seminole County Commission received so much public comment and documentation. What Petitioners characterize as resistance to enacting the Ordinance is actually revealed in the record as the Seminole County Commission's desire to create as many opportunities as possible for public comment and discussion. Seminole County's Commissioners held meetings over the course of more than one year to receive evidence and public comments (R-3-446-494).

During these many public meetings, Seminole County's Commissioners reviewed and admitted into the record other similar nudity ordinances that had been

enacted in other jurisdictions along with the cases resulting from challenges to those ordinances (R-10-1393-1492). The documented evidence also provided the history of adverse secondary effects addressed through the enactment of similar nudity ordinances while specifically discussing the relevant cases such as *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991) (R-3-457).

In a complete reversal of their prior position, Petitioners now claim that it was improper to allow the community to become involved and instead they argue the correct method was to reject the public comment. This argument directly contradicts the previous argument submitted by Petitioners' attorneys. The record reveals that the clubs hired attorneys to appear before the Seminole County Commission over the course of the public hearings in 1997 and 1998 (R-3-448-449). At the June 10, 1997, Seminole County Commission meeting, attorney Wasserman and attorney Dean appeared on behalf of the clubs in Seminole County, including the Plaintiff in the companion case – Club Juana (R-3-448-449).[1] Attorney Wasserman stated at the June 10, 1997, meeting that "he agrees with setting a community standard, but you don't do it by letting the 7,000 members of the Christian Coalition or Club owners decide, but allow all the people of this community [to] decide and that's what he thinks should be done" (R-3-448-449). Now, in a complete change of course, Petitioners claim that the community involvement was improper.

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[1] A petition has also been filed in the companion case known as *McKee v. Casselberry*, 873 So.2d 373 (Fla. 5th DCA 2004), Docket Number 04-177.

The volumes of evidence supporting the Ordinance were reviewed by the County Commissioners and the preamble to Ordinance No. 98-49 states "local governments for other counties have successfully passed and defended regulations relating to public nudity." The preamble further states that it is supported by federal and state case law, and specifically lists examples of that case law (Pet. App. E).

B. Misstatements of Fact Contained Within the Petition for Writ of Certiorari

Petitioners continue to submit assertions of fact which conflict with reality (as evidenced by the lack of citation to any record in many places). Petitioners wrongly assert that the trial court "rejected" the evidence supporting the Ordinance. (Pet. for Writ of Cert., p. 7) Addressing the Ordinance, the trial court held "The evidence is convincing that Seminole County mainly relied upon prior court decisions and the findings made in them in enacting its ordinance" (Pet. App. B, p. 9). Petitioners wrongly assert that the evidence supporting the Ordinance was "weak and rejected" and was "not part of the legislative record" (Pet. for Writ of Cert., p. 7). The Seminole County Commission record contains volumes of materials supporting nudity regulations mirroring the Ordinance which included examples of secondary effects, other enacted ordinances, and the cases interpreting those ordinances (R-3-437-494; R-4-600-621; R-5-626-759; R-6-918-930; R-7-961-1062; R-1-1393-1492).

Petitioners wrongly assert that the trial judge "emphatically rejected" the testimony of Seminole County's

expert witness, William Henry George, Ph.D.[2] (Pet. for Writ of Cert., p. 8). Although the trial court accepted the studies conducted by Dr. George on the effects of sexual arousal and sexual risk-taking (some of which have been funded by a $1.8 million grant from the federal government), the trial court appears to conclude the studies did not reveal anything that is not already generally known, stating, "What did he and the taxpayers learn that Chaucer did not already know more than 600 years ago?" (Pet. App. B, p. 13). Contrary to Petitioners' assertion, nowhere within the trial court's order did the trial court state that Dr. George's testimony was rejected (Pet. App. B, pp. 11-13).

Petitioners also assert that the County relied upon evidence that adult clubs cause a decrease in property values as evidence of adverse secondary effects in adopting the Ordinance. This assertion is also false. The Ordinance is supported by evidence of secondary effects other than property values.

Petitioners wrongly assert that Terry Danner presented overwhelming evidence to refute the Ordinance. On the contrary, Danner admitted in his study and in testimony that he was unable to reach any conclusions regarding Seminole County's Ordinance because it has countywide effect. In his study, Danner stated "It is important to note here that the data available from the Seminole County Sheriff's Office was not aggregated in a manner that would allow for hypothesis testing in the forms used

[2] This case was tried together with the companion case known as *McKee v. Casselberry*, Docket Number 04-177, and Dr. George's testimony was adopted by Seminole County.

above (i.e. throughout the study). . . ." Danner also testified that he was unaware if the other jurisdictions researched in his study had enacted regulations on public nudity (MR-15-899). Danner stated that the raw data did not support any conclusion of any effect upon the crime rate – such as prostitution – because the Ordinance is a county-wide regulation (MR-15-884-885).

Danner's entire testimony was put forth to dispute the evidence relied upon by the City of Casselberry (in the companion case). At no time did Danner discuss the Seminole County Ordinance – whether supported or not supported by any data – because Petitioners merely argued that the referendum prevented reliance upon any data that Danner would dispute.

At trial, Danner made admission after admission that he failed to follow the proper methodology that even he agreed would have a direct impact upon the correct results of his study. Danner testified that all of the following factors would impact the accuracy of his conclusions: types of businesses; types of zoning; percentage of commercial vs. residential zoning; management; enforcement efforts; the number of law enforcement officers available to detect crime; degree of proactive law enforcement; types of crimes; population increase; economic influences; tourist migration (MR-15-829-845). Although Danner admitted these factors would impact the accuracy of his conclusions, he testified that he failed to consider any of these factors in his study (MR-15-857-879). Danner concedes in his testimony that the charts and reports he created did not account for any of these factors (MR-15-857-879).

Danner testified that his studies, which purportedly showed an increase in crime after the adoption of the

Ordinance, focused on index crimes, such as rape. Index crimes are not the only types of crimes that the Ordinance was intended to reduce. Danner stated that an establishment offering live, nude dancing generally creates a sexually-charged atmosphere; an establishment that encourages a party atmosphere may also encourage sexual aggression; and, a party atmosphere can facilitate the occurrence of illegal drug use and sales.

Significantly, Danner admitted that his study failed to comply with the methodology Petitioners assert must be utilized in order to support the accuracy of his own conclusions (MR-15-846-857). Danner further conceded that his study was based upon his subjective conclusions which allowed him to classify data as a crime or not a crime despite the information revealed by the raw data (MR-15-851-852). Danner also admitted that he failed to consider any error rates in his study despite his testimony that any reliable study must account for error rates (MR-15-857).

C. Evidence Presented By the County In Support of the Ordinance

Petitioners assert that the evidence presented by Lt. Edward Allen was in support of another regulation and not the Ordinance (Pet. for Writ of Cert. 17). This assertion is false. Lt. Allen stated that he was present at the June 10, 1997, Seminole County Commission meeting where his study was presented to support both the county's adult entertainment code as well as the Ordinance (MR-11-130).

Throughout 1997 and 1998, numerous public meetings were held to accept evidence and allow public comment on the Ordinance. Over the course of a full year, the County

staff researched relevant cases related to secondary effects evidence and compiled a wealth of relevant information, including cases and the one hundred pages of documentation titled "Constitutional Ordinance Which Prohibits Public Nudity" detailing the secondary effects and the crime, blight, and public health problems associated with adult businesses (R-10-1393-1492). Seminole County's Commissioners reviewed and admitted into the record other similar nudity ordinances that had been enacted in other jurisdictions along with the cases resulting from challenges to those ordinances (R-10-1393-1492). The evidence also provided the history of adverse secondary effects addressed through the enactment of similar nudity ordinances while specifically discussing the relevant cases such as *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991) (R-3-457).

At trial, the evidence included, but was not limited to, the following: information regarding arrests and illegal activity including drug trafficking, drug consumption, prostitution, illicit sex, robberies, and arrests at Club Juana and Rachel's (which is another adult entertainment club located in Seminole County); affidavits from former employees of Rachel's who were arrested during an undercover sting operation indicating illicit activity such as prostitution and drug sales occurs at the clubs; the report of Casselberry Police Department Lieutenant Joe Mulson regarding the arrests of seventeen persons at Rachel's as a result of the undercover sting operation; testimony of other individuals regarding the adverse secondary effects; case law and studies from foreign jurisdictions regarding the secondary effects of nudity; and a series of charts and testimony which depicted the community standards of Seminole County and cities surrounding Casselberry, and

the fact that Casselberry's standards were lower than the standards of all surrounding communities.

D. Important Evidence Presented By The County That Petitioners Failed to Mention in Their Petition for Writ of Certiorari

At trial, the County presented a plethora of evidence, including hours of undercover video tapes, documenting the illegal activity occurring at an adult club in Seminole County known as Rachel's.

1. Detective Christine Gigicos

Detective Gigicos worked undercover during an operation to investigate the strip clubs. Detective Gigicos discovered drug activity and prostitution in the strip club along with evidence that the strip club's management was aware of the criminal activity. On her first visit to the strip club, Detective Gigicos observed a stripper bent over between two male patrons engaging in sexual activity. On other occasions, she witnessed strippers involved in sexual acts with each other, drug activity and prostitution. Detective Gigicos returned to the strip club a number of times between January 2000 and July 2000 and during the investigation she witnessed criminal activity "nine out of ten times" (MR-16-1027-1033).

2. Detective William Christiansen

Detective Christiansen is assigned to the CCIB – a drug and vice task force for Seminole County. In his role, he investigated the strip clubs in Seminole County. Detective Christiansen witnessed several acts of prostitution

involving numerous individuals as well as drug transactions with the strippers. Additional exhibits admitted through Detective Christiansen included the judgments and sentencing documents for the strippers arrested at the strip clubs for criminal acts. Also admitted into evidence through Detective Christiansen were the video and audio tapes revealing criminal activities at the strip clubs (MR-16-1057-1066).

3. Detective Paul Winsett

Detective Winsett is assigned to the vice and racketeering unit at the Metropolitan Bureau of Investigation. MBI investigates organized crime, prostitution and drug activity. He witnessed criminal acts of prostitution as well as the use and delivery of controlled substances at the strip clubs. Detective Winsett had an active part in the undercover and ensuing investigation that led to search warrants being issued related to the criminal activity at the strip clubs. The affidavits for the search warrants were created by combining the reports from undercover agents, statements from witnesses, and the transcripts of the undercover audio and videotapes. The undercover audio and videotapes reveal criminal activity at the strip clubs throughout the course of the seven month undercover investigation. This evidence of criminal activity at the strip clubs was admitted into the record through Detective Winsett (MR-16-1080-1088).

4. James Mulrenin

Mulrenin was the manager at one of the strip clubs for eight years. Mulrenin witnessed criminal activity and he also arranged acts of prostitution between strippers and

customers. Mulrenin testified that the regular operation was to take some customers up to the VIP room and then the general manager would pull up a limousine to the back of the strip club and the girls would get into the limousine to leave with the customers. Mulrenin personally escorted the strippers and customers out the back door for the purpose of engaging in prostitution. Mulrenin testified that customers gave him money for the strippers to engage in prostitution and for drugs. Mulrenin testified that the owner of the strip club, Jim Vigel, gave him money to give to a stripper so that she would go home with a customer (MR-16-1106-1111).

Mulrenin testified regarding a policy that the owner of the strip club established related to reporting criminal activity to the police. The policy adopted by the strip club and discussed with employees was "if we found drugs or anything we were supposed to . . . that was the last resort to call the cops. He didn't want phone calls being made to the police because after so many, you know, I don't know exactly the law, but it didn't look good to have so many calls to the police department" (MR-16-1113). Mulrenin also testified that he witnessed the sale and use of illegal drugs at the strip club, but the policy was to "flush" the drugs instead of calling the police (MR-16-1113-1114).

At trial, Petitioners did not even attempt to refute the evidence of the illegal activity occurring at adult clubs in Seminole County. Instead, Petitioners place heavy emphasis on the testimony of Judith Hanna. It must be noted that within all of Hanna's testimony, she stated that a dancer's message can still be communicated and the dance still has serious artistic value. Petitioners wrongly assert that Hanna's testimony trumps the Ordinance and that no evidence supported the Ordinance requiring more than a

G-string. This assertion is false. Major William Kennedy testified that he reviewed the FDLE data comparing Seminole County and an adjoining jurisdiction known as Orange County. Major Kennedy found that there was more crime reported in Orange County than in Seminole County following enactment of the Ordinance. Major Kennedy also testified that the nudity regulation in Orange County is "not as restrictive as Seminole County" because the Orange County nudity regulation "doesn't require as much clothing regarding the buttocks" (MR-16-1015-1017). Petitioners' assertion is that never again in the history of adult entertainment regulation will the courts be permitted to uphold any covering of any type – G-string or otherwise – because according to Petitioners the expression is never complete until the last stitch is dropped. Petitioners' assertion is not that in some jurisdictions a scientific study could support the requirement of a G-string. Rather, Petitioners' assertion is that no ordinance could ever contain any covering requirement because to do so would interfere with "nude expression."

ARGUMENTS FOR DENYING THE PETITION

I. Petitioners failed to articulate any specific challenges to the decision rendered by the Florida Fifth District Court of Appeal; and, therefore, have not presented any issues which this Court should review.

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257, which vests this Court with certiorari jurisdiction to review certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The District

Court of Appeal for the Fifth District of Florida is an intermediate appellate court, but is considered to be the "highest court" of Florida for the jurisdictional purposes of 28 U.S.C. § 1257(a). Accordingly, the "final judgment or decree" that is before this Court for review is the opinion on this matter that was rendered by the Florida Fifth District Court of Appeal, which is reported at *Koziara v. Seminole County,* 873 So.2d 374 (Fla. 5th DCA 2004) (Pet. App. A).

Petitioners assert that they are seeking review of the Fifth District Court's decision in this matter. A cursory review of Petitioners' argument, however, reveals that they have not set forth one single challenge to the Fifth District Court's decision in this case. Instead, Petitioners are asking this Court to review the basis for the trial court's ruling upholding the Ordinance. Petitioners summarized Point One of its case as follows: "The truth is, the trial court upheld Seminole County's ordinance because it determined that Casselberry's ordinance was 'constitutional' because government entities have the power to enact them as a matter of equity if other local municipalities prohibit nude entertainment" (Pet. for Writ of Cert., pp. 17-18). In the real truth, the trial court held "The evidence is convincing that Seminole County mainly relied upon prior court decisions and the findings made in them in enacting its ordinance" (Pet. App. B, p. 9). With regard to Point Two, Petitioners summarized their argument as follows: "The trial judge got the facts right but got the law wrong. For whatever reason, he misunderstood the nature of the fourth prong of *United States v. O'Brien*, 391 U.S. 367 (1968)" (Pet. for Writ of Cert., p. 22).

It is important to note that the Fifth District Court conducted *de novo* review of the trial court's decision upholding the Ordinance. *See North Florida Women's*

Health and Counseling Serv., Inc. v. Florida, 866 So.2d 612 (Fla. 2003) (trial court's ruling concerning the constitutionality of a statute or ordinance is subject to *de novo* review). Since the Fifth District Court did not issue a written opinion, but rather merely issued a citation decision, there is no way to determine the basis for the Fifth District Court's decision. (*See* Pet. App. A., *Koziara v. Seminole County,* 873 So.2d 374 (Fla. 5th DCA 2004)). For all we know, the Fifth District Court completely rejected the trial court's conclusions and decided to uphold the constitutionality of the Ordinance for entirely different reasons.

In any event, the Petition for Writ of Certiorari should be denied because Petitioners failed to articulate therein why this Court should exercise its discretionary jurisdiction to review the Fifth District Court's decision.

II. Ordinances similar to Seminole County's Ordinance have repeatedly been declared constitutional by this Honorable Court and state and federal courts around the country, and therefore, this case does not present an important question that has not been, but should be, settled by this Court.

As indicated above, the question presented in this case is whether Seminole County's Ordinance is constitutional. Ordinances similar to the one at issue herein have been declared constitutional by this Court and federal and state courts around the country. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991).

In *Baby Dolls Topless Saloons v. Dallas*, 295 F.3d 471 (5th Cir. 2002), *cert. denied*, 124 S.Ct. 104 (2003), the Fifth

Circuit rejected the contention that a city must prove that its bikini ordinance – as opposed to a pasties and G-string ordinance – must lower crime. The court found that "Such a requirement would go too far in undermining [the] settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Id.* at 481 (quoting *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 439 (2002)).

Notably, Petitioners' counsel in this case presented many of the same arguments in *Gatena v. County of Orange*, 80 F. Supp. 2d 1331 (M.D. Fla. 1999). The court rejected Petitioners' counsel's arguments, reasoning that Orange County's ordinance was almost identical to the St. John's ordinance upheld in *Café 207, Inc. v. St. John's County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996).

As the case law cited above reveals, the issue presented by this case is well-settled. Municipalities may indeed constitutionally regulate public nudity. Because there is no unsettled, important question presented by this case, this Court should deny the Petition for Writ of Certiorari.

III. The Florida Fifth District Court of Appeal did not issue a published opinion in this case, and therefore, its decision does not create a conflict with any decision of a state court of last resort or federal court. Accordingly, this case does not merit this Court's review.

The Florida Fifth District Court's decision upholding the constitutionality of the Ordinance is simply a citation

decision. In other words, the decision merely cites one case as the basis for the court's ruling and does not discuss whatsoever the rationale for the court's ruling. (*See* Pet. App. A., *Koziara v. Seminole County,* 873 So.2d 374 (Fla. 5th DCA 2004)). Because there is no discussion contained within the court's decision, the decision does not on its face create a conflict with any other court decision.

Furthermore, as set forth above, many courts around the country have upheld the constitutionality of ordinances similar to Seminole County's Ordinance. The Fifth District Court's decision in this matter does not conflict with those decisions, but rather lends further support for the premise that municipalities may lawfully regulate public nudity. Accordingly, this case does not present a conflict in the law which requires this Court's resolution. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Seminole County, Florida, respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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